Alabama Department of Environmental Management

# FIELD OPERATIONS DIVISION

# CLEAN WATER ACT §401 WATER QUALITY CERTIFICATION PROGRAM

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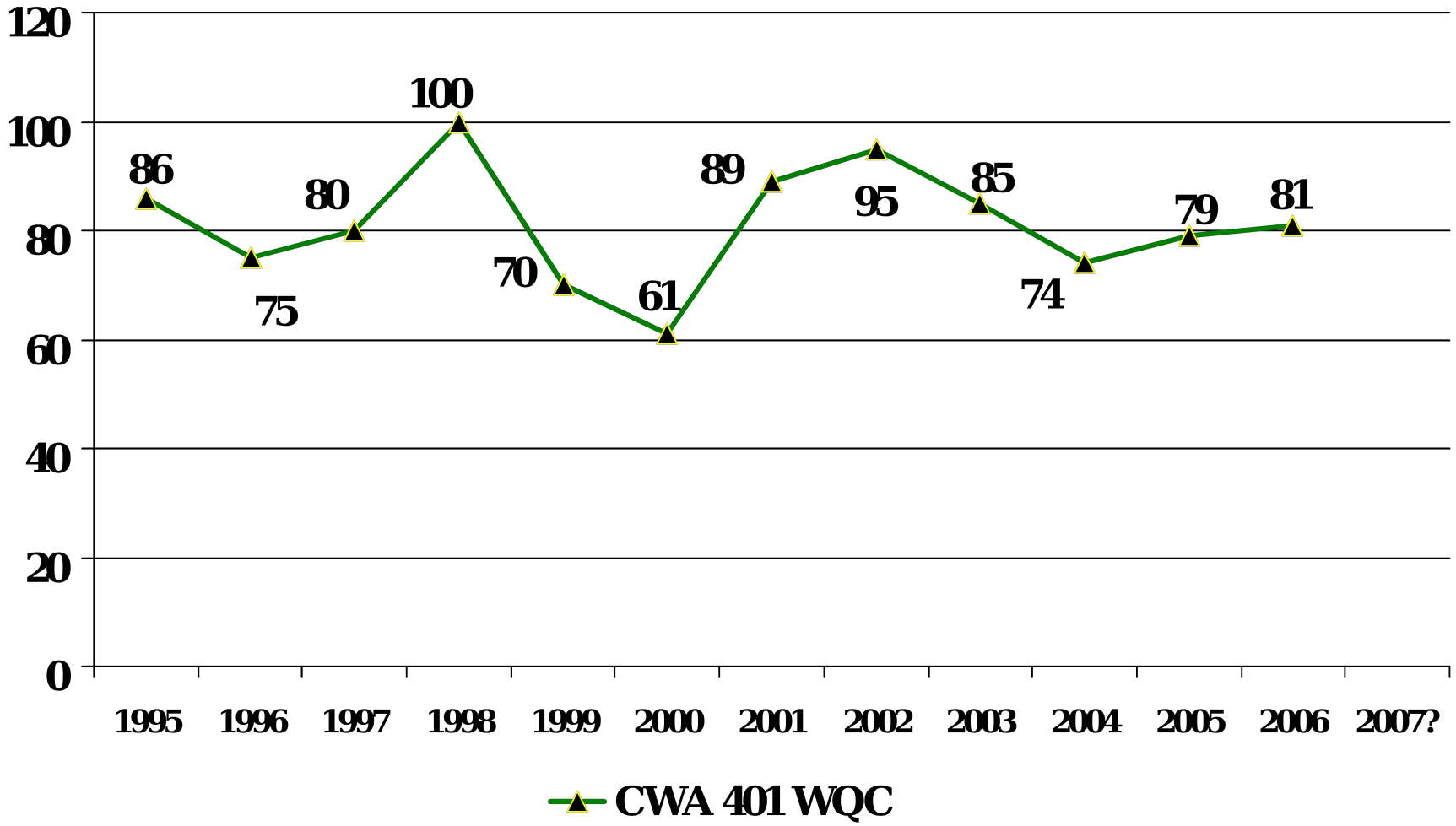
# CWA §401 Water Quality Certifications



# Statutory And Regulatory Authority

- Federal and state statutes, regulations, court rulings, etc. influence current regulatory mechanisms for implementing Clean Water Act (CWA) §401 State Water Quality Certification (WQC) programs

- Three federal statutes play a primary role in dredge and fill activities
  - §10 of the Rivers and Harbors Act (RHA) of 1899, as amended
  - §404 of the Clean Water Act, as amended
  - §401 of the Clean Water Act, as amended
  - Coastal Zone Management Act (CZMA) of 1972, as amended, in designated coastal areas

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# CWA §401(a)(1)

- Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the Act.
- Such State agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.
- If the State, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.
- No license or permit shall be granted until the certification required by this section has been obtained or has been waived.
- No license or permit shall be granted if certification has been denied by the State.

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# CWA §401

- CWA §401 grants states the authority to certify, conditionally certify, waive, or deny that federally permitted or licensed activities comply with applicable state water quality requirements

- State water quality requirements in many cases can be more stringent than the federal requirements

- The federal permit applications most often reviewed by ADEM are submitted under §404 of the CWA, while some §10 of the RHA applications are reviewed at the request of the Corps of Engineers (COE)

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# CWA §401

- §404 permits are issued by the COE and relate to dredge and fill activities in navigable waters and waters of the United States

- The COE §404 permits cannot be issued without §401 State WQC or a waiver of certification from ADEM

- Typically, WQCs issued by ADEM impose special conditions designed to protect water quality that the COE must include into the final §404 or §10 permit

# Involved State And Federal Agencies

## Alabama Department of Environmental Management (ADEM)

- CWA §401 provides states with sole authority regarding state WQC of federal permits, and EPA does not have an oversight role relative to ADEM's §401 WQC process

- ADEM reviews COE permit applications under §401 of the CWA in order to make a determination relative as to whether the project, as proposed, will cause or contribute to a violation of Alabama water quality standards during construction and in some cases as a result of operation of the completed facility

- WQC reviews are coordinated by ADEM's Field Operation Division's Mining & Nonpoint Source Section and Mobile Branch

# Involved State And Federal Agencies

**Alabama Department of Environmental Management (ADEM)**

- The review of Federal Energy Regulatory Commission (FERC) WQCs are coordinated by ADEM's Water Division

- ADEM conditions WQCs based on applicable technical standards, administrative requirements, and best management practices (BMP) as appropriate to ensure the protection of water quality (ADEM Admin. Code chs. 335-6-10 and 335-6-11), and to ensure consistency with ADEM's National Pollutant Discharge Elimination System (NPDES) rules (ADEM Admin. Code ch. 335-6-6) and other water quality protection efforts

- ADEM WQC processing fees (ADEM Admin. Code r. 335-1-6, Fee Schedule B) currently range from $340 to $1,790

# Involved State And Federal Agencies

## Other Agencies

- There are other agencies at the federal and state level involved in the COE permit review process, however for the purposes of §404 permit issuance and §401 water quality certification, the COE and ADEM are the lead agencies.

- Other agencies involved in the process through federal or state requirements, or through the comment process required for permits, include, but are not limited to:
  - U.S. Fish and Wildlife Service
  - Alabama Department of Conservation and Natural Resources
  - Alabama Historical Commission
  - Alabama Department of Economic and Community Affairs
  - Tennessee Valley Authority

# COE Permitting and ADEM Water Quality Certification Process

- ADEM's Mining & Nonpoint Source Section manages §401 WQCs for permits drafted by either COE District for Alabama, with the exception of Mobile, Baldwin, and Washington counties

- §401 WQC for Mobile, Baldwin, and Washington counties are managed by ADEM's Mobile Branch

- Dredge and fill projects within Mobile, Baldwin, and Washington counties may also fall under the coastal certification program and may involve additional coastal consistency conditions (ADEM Admin. Code Div. 335-8)

ADEM

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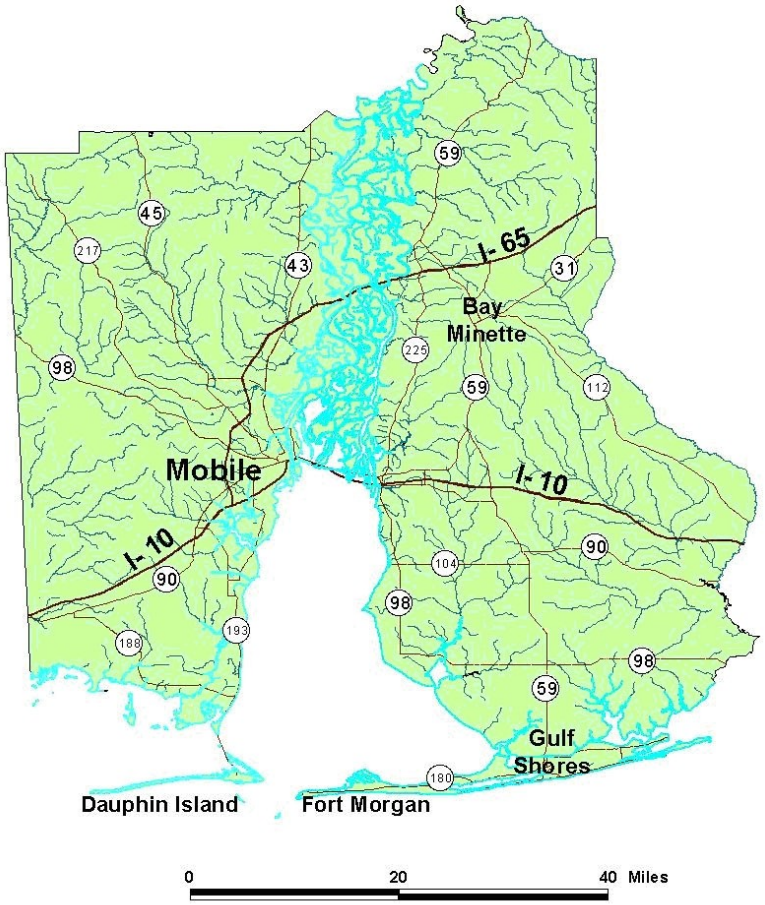


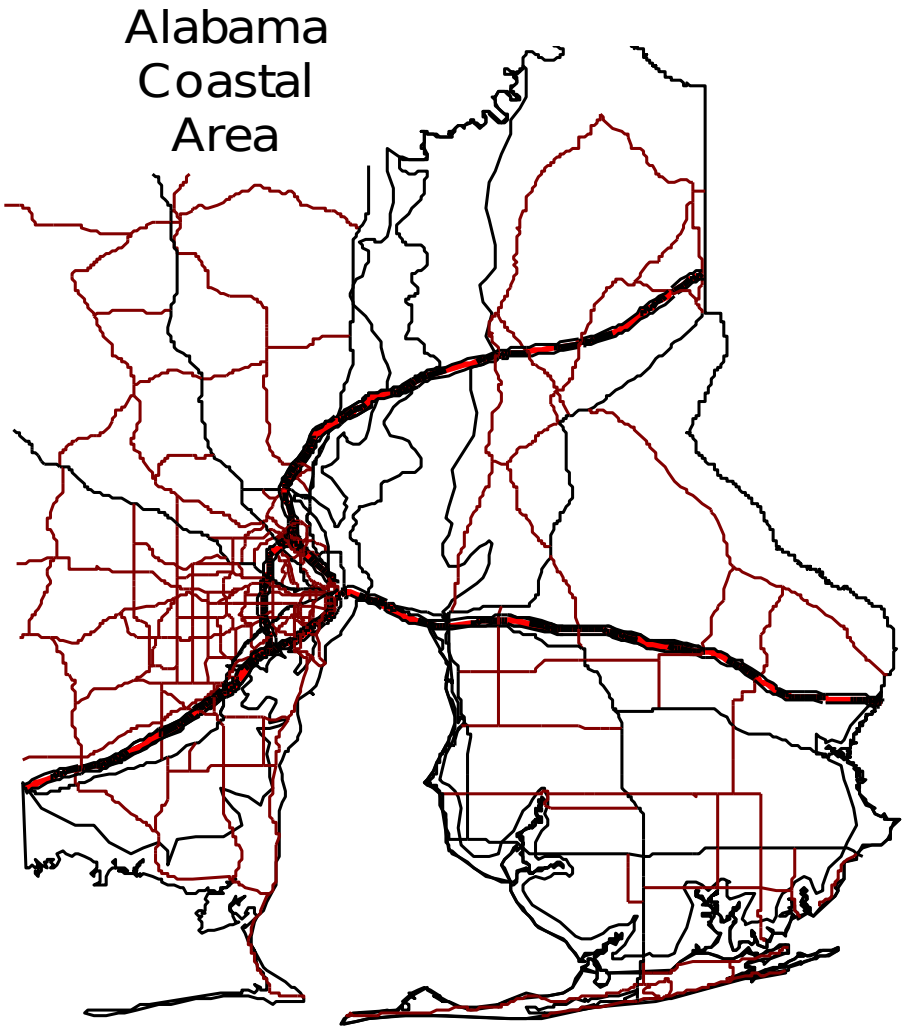

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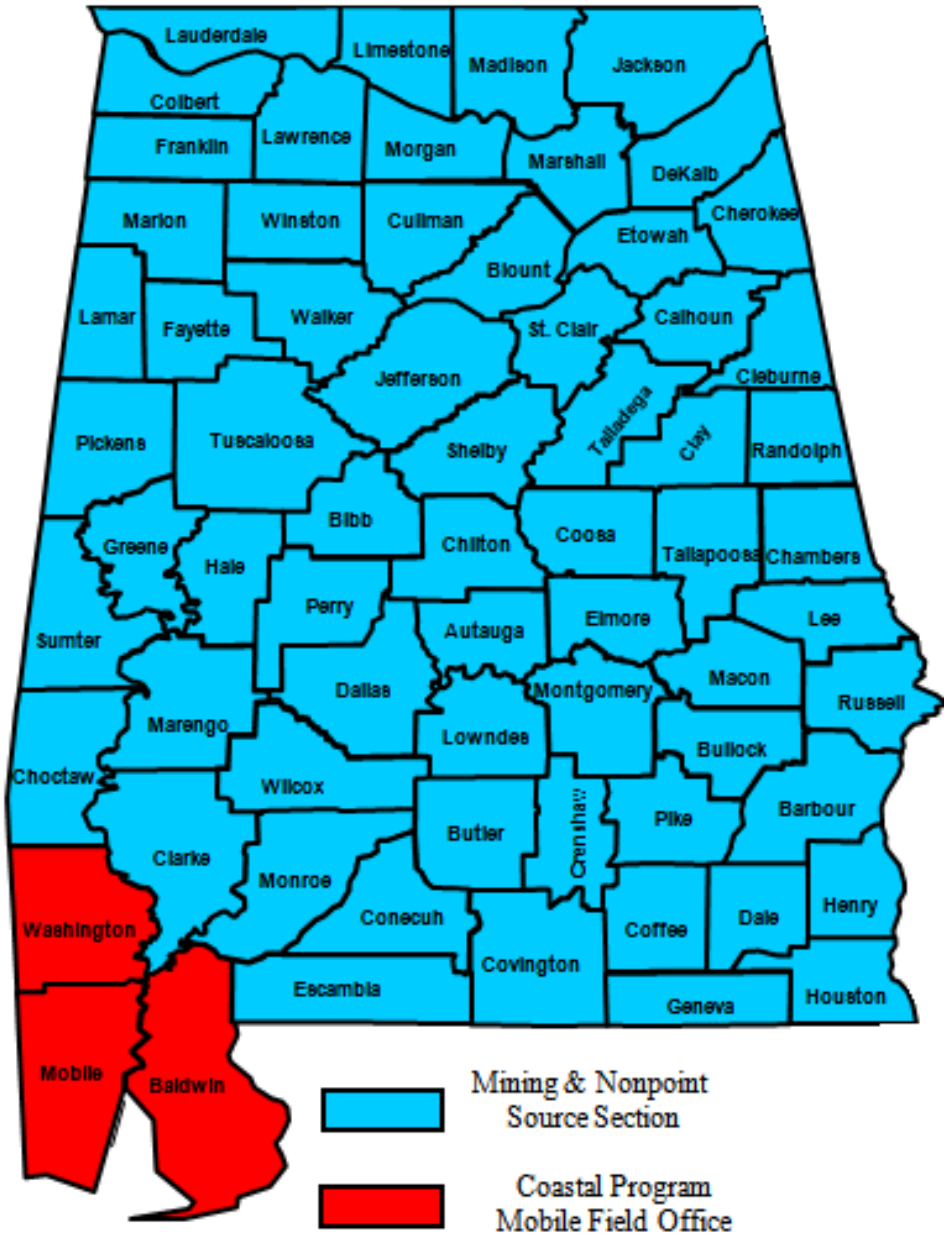
# ADEM Field Operations Division

# 401 Water Quality Certification Service Areas



# COE Permitting and ADEM Water Quality Certification Process

- The COE will notify the applicant what type of COE permit coverage is needed prior to the applicant proceeding with the proposed activities

- Unless contacted by ADEM, an applicant does not need to coordinate with ADEM for WQC outside of the coastal zone when applying for LOP, NWP or GP coverage from the COE

- The COE and/or ADEM may choose to make a site visit prior to making this determination

# COE Permitting and ADEM Water Quality Certification Process

- Should the proposed activities require a §404 IP, and in some cases a §10 permit as determined by the COE, ADEM individual WQC is required to be obtained prior to commencing regulated activities

- ADEM WQCs for a COE IP, NWP, and GP are valid for 5-years but can be extended for a short time for cause, if warranted

- Valid reasons for extending WQC and/or the 18-month project commencement clause include:
  - unavoidable projects delays due to legal/litigation issues
  - delays in obtaining other required permits/approvals
  - delays in interagency coordination/approval regarding mitigation, etc.

# COE Permitting and ADEM Water Quality Certification Process

- The COE will issue a COE/ADEM Joint Public Notice (JPN) for proposed CWA §404 IP coverage once the COE has made a preliminary decision that the applicant has met applicable COE technical and administrative requirements

- ADEM generally requires a 30-day public comment period for each IP WQC

- This notice serves as the applicant's formmal request for ADEM WQC

- If needed, ADEM contacts the applicant to request:
  - Required processing fee
  - Copy of the joint COE/ADEM 404/401 application
  - Any needed additional technical information
  - Detailed diagrams, cross-section views, plan views, aerial image if possible, digital photographs of site

# COE Permitting and ADEM Water Quality Certification Process

- Once the 30-day comment period expires, and the COE and applicant have resolved/addressed any identified issues/concerns, the COE forwards all correspondence/comments along with applicable responses to comments by the COE and/or the applicant, to ADEM

- COE makes a formal request to ADEM for a determination relative to water quality certification

- Often, an ADEM WQC is issued with special conditions identified that must be included as conditions of the COE permit

# COE Permitting and ADEM Water Quality Certification Process

- ADEM will make a final determination relative to WQC after the processing fee is received, the public notice and comment process is complete, and ADEM review of all relevant information is complete

- ADEM may determine that there is not reasonable assurance that the project can be conducted in a manner which will be protective of water quality and the certification will be denied

- In this case, the COE is unable to issue the §404 permit

# COE Permitting and ADEM Water Quality Certification Process

- A project may also be denied on the basis of:
  - Incomplete or non-payment of processing fee
  - Incomplete or non-submission of technical information
  - Incomplete response to address comments relative to matters within ADEM's jurisdiction

- ADEM reserves the right to waive certification for after-the-fact (ATF) permit requests and in other specific instances.

- If project is partially completed when an ATF WQC is requested, a certification waiver may be appropriate for the completed portion of the project

- The fee must be submitted and all information related to the project (comments, technical information, etc.) must be submitted just as if a certification was being issued in order for ADEM to determine if a waiver of certification is appropriate

# COE Permit and ADEM WQC update/modification

- ADEM WQC Action Not Required: minor project information update that the ADEM 401 WQC issued for the project (must be the same applicant) would still apply to the minor modified/revised project description without the need for a new/updated WQC from ADEM. A fee is not currently assessed

- ADEM Transfer of WQC: transfer fee required.

- ADEM WQC Minor Modification: minor change that does not require official modification to the COE permit or ADEM WQC. Examples would be a minor change in project specifications, calculation error correction, or other minor changes to the project. Another type of minor modification is the extension of the 18-month construction commencement provision. While a letter is sent for the 18-month provision time extension, a fee is not currently assessed for any of these examples.

# COE Permit and ADEM WQC update/modification

- ADEM WQC Modification: change in project specifications that would require a modification to the existing COE permit and existing ADEM WQC. Examples would be a change in project scope or scale, a COE permit and WQC transfer, short-term extension of the 5-year expiration date, or other moderately significant changes to the project. Any of these situations will require the appropriate WQC modification fee.
- ADEM WQC Major Modification: major/significant change in project specifications requiring a new or significantly revised COE permit and PN, and therefore a new WQC. This situation would apply if there is a significant change in the scope and/or scale of the project affecting the ADEM 401 WQC determination and would require the appropriate WQC processing fee.

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# WQC Considerations

- Projects in Tier 1 impaired stream, CWA § 303(d) listed steam, or stream with Total Maximum Daily Load (TMDL)
- Projects in Tier 3 stream – Outstanding National Resource Water (ONRW) or Outstanding Alabama Water (OAW)
- Minimum stream flow issues relative to dam installation/operation, significant water withdrawal, downstream users, downstream NPDES dischargers

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# WQC Considerations

- Ensure concentration of low-flows instream for new/modified channels and culverts
- Water quality parameters: pH, DO, turbidity, temperature, etc.
- Improve/enhance waterbody integrity
  - bank and channel stability, aquatic habitat, riffle-pool complex, shading, etc.
- Unobstructed flow through structures
  - Fish and wildlife movement
- Flushing or turnover of water in canals, barge slips, etc.

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# WQC Considerations

- Areas or waterbodies known or with significant potential to have contamination in the water or in sediment
  - Applicant prospectively analyzes dredge material for potential hazards/toxics
  - If necessary, applicant conducts monitoring during project implementation
- Construction stormwater NPDES registration and runoff control
- NPDES permitting for re-mining or commercial recovery of material from upland dredge waste disposal sites

# WQC Considerations

- Prepare and implement comprehensive BMP plan
  - Spill prevention control and countermeasures (SPCC)
  - Trash debris management
  - Sediment and erosion control
  - Control potential airborne pollutants
  - Manage sediment disposal areas
- Weekly inspection of activity by qualified credentialed professional (QCP)
- Retention of records
- Submit report for noncompliance events
- Compliance with all applicable ADEM rules

# ADEM Contacts

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